IN THE HIGH COURT OF DELHI

CM(M) No.1690-97/2005

Shri Fateh s/o Shri Kure
(Deceased) through his LRs ..... Petitioners
! through: Mr.N.S.Vasisht, Advocate

VERSUS

$ Shri Hukmi & Ors. ..... Respondent
^ through : Mr.Maheshwar Dayal, Sr. Advocate
with Ms.Chitralekha Sen, Adv.

% DATE OF DECISION: 20.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**
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1. 2 points need to be decided. Firstly, whether the instant petition is maintainable. Secondly, if the instant petition is maintainable, whether the impugned order dated 23.5.2005 can be sustained.

2. To appreciate the issues it may be noted that certain lands were recorded as *Bunjar Quadim* (waste land) when Delhi Land Reforms Act, 1954 was promulgated. Under the mandate of Section 7 of the Delhi Land Reforms Act these lands were

shown vested in the Gaon Sabha. Consolidation commenced in the village. Part of Gaon Sabha land was utilized for extending the village Abadi. The Consolidation Officer allotted certain plots to the petitioners for their residence within the extended Abadi of the village as per notified scheme. The issue pertaining to consolidation was fought by the respondents by way of an appeal before the Additional Collector and finally a writ petition in this court which was dismissed with an observation that respondents may seek remedies as available in law.

3. Respondents filed applications before the revenue assistant praying that the land being shown as vested in Gaon Sabha when Delhi Land Reforms Act 1954 was promulgated be set aside. The matter was litigated till the highest authority, i.e. Financial Commissioner. Respondents lost the battle.

4. Thereupon respondents filed 2 suits registered as Suit Nos.391/1980 and 90/1981 seeking declarations and injunctions. Declarations sought were that the orders passed by the consolidation authorities under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 be declared illegal. In the 2 suits various issues were framed. Inter alia, an issue was framed whether the jurisdiction of the

civil courts was barred in view of Section 44 of the Consolidation Act. An issue was framed whether the orders passed by the revenue authorities were illegal, void or without jurisdiction?

5. Other issues were also framed on merits.

6. Nobody pressed for any issue to be treated as a preliminary issue. Evidence was recorded. But, when final judgment was pronounced on 4.10.1993, learned Trial Judge rejected the plaints holding that the orders passed under the Consolidation Act could not be subjected to a challenge in a suit.

7. Respondents filed 2 appeals which were allowed vide order dated 23.5.2005 holding that the learned Trial Judge ought to have decided all issues. No opinion was expressed by the learned Appellate Judge on the maintainability of the suit. Matter was remanded to the learned Trial Judge to decide all issues except the issues which had already been decided.

8. Petitioners have challenged the order dated 23.5.2005.

9. Placing reliance upon Section 105 of the Code of Civil Procedure read with Order XLI Rule 1(u) of the Code of Civil Procedure it is urged that an appeal lies against an order remanding a case by the appellate court under Order XLI Rule

23 of the Code of Civil Procedure.

10. Order XLI Rule 23 of the Code of Civil Procedure reads as under :-

> **"23. Remand of case by Appellate Court.-** Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand."

11. Suffice would it be to state that the sine qua non for exercising power of remand under Order XLI Rule 23 of the Code of Civil Procedure is when a decree on a preliminary point is reversed in appeal; meaning thereby that on merits the Appellate Court has disagreed with the decree of the learned Trial Judge on a preliminary point.

12. In the instant case, as noted above, learned Appellate Judge has not reversed the decree passed by the learned Trial Judge on the preliminary point. Operative part of the order dated 23.5.2005 reads as under :-

> "In view of my above discussion, I am of the

> considered opinion that both the appeals should be remanded back to the learned trial court. Thus both th appeals are allowed and the impugned Judgment and decree dated 4.10.1993 is set aside. The learned trial court is directed to records its finding after hearing the parties on all the issues except the issues which have already been decided and then dispose of the suit in accordance with law. As both the suits are of the year 1981, it is expected that the learned trial court will try and ensure that both these suits are decided at the earliest say atleast within period of six months from today. Decree-sheet be prepared accordingly. Parties are directed to appear before the Ld. Trial court on 03.06.2005. A copy of this order alongwith trial court records be sent back and the appeal files be consigned to the record room."

13. Surprisingly, the appeals have been disposed of without reversing the decree of the learned Trial Judge. While remanding the matter, learned Trial Judge has been directed to decide all issues except the issues which have already been disposed of in the suit.

14. The position therefore would be that the reasoning of the learned Trial Judge and the decree rejecting the plaint would stand notwithstanding the remand.

15. The order in question does not stand the scrutiny of Order XLI Rule 23 CPC. To put it differently, though purportedly in exercise of power under Order XLI Rule 23 of the Code of Civil Procedure, the order actually is not one within the confines of

Order XLI Rule 23 of the Code of Civil Procedure.

16. The procedural irregularity committed by the learned Appellate Judge has created an anomalous situation. On the one hand the decree of the learned Trial Judge on the preliminary point has been set aside. But, on the other hand, the issue decided by the learned Trial Judge has not been reversed on merits. Further, learned Trial Judge has been directed to decide the other issues save and except the issues already decided.

17. At the remanded stage the decision of the learned Trial Judge would have to be on the remaining issues. What happens to the merits of the decision passed by the learned Trial Judge rejecting the plaints?

18. I thus hold that keeping in view the peculiar nature of the order passed by the learned Appellate Judge the instant petition under Article 227 of the Constitution of India is the only remedy available to the petitioners.

19. With respect to the second contention urged by learned counsel for the respondents that learned Trial Judge ought to have decided all issues, suffice would it be to state that under Order XIV Rule 2(2) it is permissible to dispose of a suit on an issue of law provided it relates to the jurisdiction of the court or

to a bar to a suit created by any law.

20. Under the circumstances it was open to the learned Trial Judge to dispose of the suit on the preliminary issues for the reason they related to the jurisdiction of a civil court to take cognizance of suits where orders passed by revenue authorities are challenged.

21. But, the respondents cannot be left without a remedy. The procedural irregularity committed by the Appellate Court needs to be rectified.

22. The impugned judgment dated 23.5.2005 disposing of appeals has to be set aside with a direction to the learned Appellate Judge to revive the appeals and decide the same on merits.

23. Ordered accordingly.

24. Petition stands disposed of quashing the judgment dated 23.5.2005 disposing of RCA No.31/03/1993 and RCA No.32/03/1993. The appeals are restored. The learned Appellate Judge is directed to decide the 2 appeals on merits.

25. No costs.

December 20, 2007 **PRADEEP NANDRAJOG, J.**
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